SUPREME COURT, U. S.
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MICHAEL RODAK, JR.

IN THE

Supreme Court of The United States

OCTOBER TERM, 1973

No. 73-1323

GENERAL MOTORS ACCEPTANCE CORPORATION and DAVE WAITE PONTIAC, INC.,

Petitioners,

vs.

WILLARD D. EASON, M. O. SATROM and JEAN M. SATROM, individually and as representatives of BANK SERVICE CORPORATION, GENERAL AUTO LEASING AND RENTAL CORPORATION,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

QUESTIONS PRESENTED

The appeal to the Court of Appeals for the Seventh Circuit was from an order dismissing respondents' complaint alleging 10b-5[1] claims against petitioners on behalf

[1] 17 C.F.R. §240.10b-5, ("Rule 10b-5") promulgated by the Securities Exchange Commission under §10(b) ("§10 (b)") of the Securities Exchange Act of 1934 (15 U.S.C. 78) (the "Act")

of respondents ("Eason and Satrom") individually and as representatives of Bank Service Corporation ("Bank Service")[2] and its subsidiary. As part of the transaction involving the issuance of 7,000 shares of the common stock of Bank Service in exchange for the purchase of the business of Waite Leasing from Waite Pontiac, respondents executed two continuing guaranties (the "Guaranty") covering certain existing and future long-term notes (the "Notes"). There was alleged fraud, and thus a violation of Rule 10b-5, in connection with that transaction. Eason and Satrom, who are being sued in state court by GMAC on the Guaranty for the amounts remaining to be paid under the Notes, have suffered alleged damages of at least $500,000.00 as a result of the fraud. Thus, in addition to the one question set forth by petitioners (Petition at 2), the following questions also would have to be considered upon a review of this case:

1. Is the Guaranty, which is a promise to pay and therefore has the same attributes as a note, a "security"?

2. Can Eason and Satrom be liable under certain "securities" (the Notes) and at the same time be denied the right to assert the 10b-5 violation that prompted the transaction which contractually created that alleged liability? In effect, are Eason and Satrom "purchasers" of the Notes?

3. Were Eason and Satrom indirect sellers of the 7,000 shares of Bank Service stock or forced sellers of their own stock of Bank Service which is now insolvent and defunct?

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[2] The following additional terms utilized by petitioners will also be utilized in this brief: "GMAC", "Waite Pontiac" and "Waite Leasing". The appendices to the Petition setting forth the opinions below will be referred to as "App. I" and "App. II".

4. Are Eason and Satrom entitled to maintain a 10b-5 derivative action on behalf of Bank Service which was defrauded and deceived in connection with the sale of its securities?

These additional questions were not considered in the opinion below because, in arriving at its result, the court chose a path that circumvented the need to meet any of these questions. Reversal of the opinion would require a negative response to each of them.

STATEMENT OF THE CASE

There was but one transaction on which respondents' 10b-5 action is predicated. As shareholders of Bank Service, Eason and Satrom were induced to execute the agreement pursuant to which Bank Service purchased the business of Waite Leasing in exchange for 7,000 shares of Bank Service stock and, concurrently, to execute and issue the Guaranty which was purchased by GMAC as a condition precedent to GMAC's investment in the Notes.

As concluded in the opinion below, respondents were investors in and direct parties to the transaction in dispute. As alleged, the transaction was tainted by fraud in violation of Rule 10b-5. As investors and principals in the transaction, Eason and Satrom have suffered legal injury. (App. I at A 10)

The District Court for the Southern District of Indiana dismissed respondents' complaint, citing *Birnbaum v. Newport Steel Corp.*, 193 F. 2d 461 (2d Cir. 1952), *cert. denied*, 343 U.S 956 (1952). (App. II at A 16) In *Birnbaum*, Judge Hand judicially imposed two limitations with regard to §10(b) and Rule 10b-5. The first limitation was:

> "... that section [§10(b)] was directed solely at that type of misrepresentation or fraudulent practice usually associated with the sale or purchase of securities rather than at fraudulent mismanagement of corporate affairs, ..." (193 F. 2d at 464)

In the same sentence, Judge Hand added the second limitation that Rule 10b-5 "extended protection only to the defrauded purchaser or seller." Based on this Court's decision in *Superintendent of Insurance of the State of New York v. Bankers Life & Casualty Co.*, 404 U.S. 6 (1971), the primary holding in *Birnbaum* has no remaining viability. The District Court apparently concluded, however, that the purchaser-seller limitation survived *Bankers Life* and that respondents were neither purchasers nor sellers of any security.

In the opinion below, the Court of Appeals first framed the question presented as whether respondents' "claim is foreclosed by the so-called '*Birnbaum* rule' which limits private relief for a violation of Rule 10b-5 to persons who were either purchasers or sellers of a security." (App. I at A 2) The court, however, elected to bypass the above questions relating to whether respondents were purchasers or sellers of securities in order to examine the remaining viability of that *Birnbaum* rule. For purposes of its decision, the court therefore *assumed* "that the only purchase or sale of a security involved in the transaction was the transfer of 7,000 shares of stock from Bank Service to Waite [Pontiac]" and thereby refined the question presented as being "whether, notwithstanding the fact that they were neither purchasers nor sellers of a security, [respondents] may obtain relief under Rule 10b-5." (App. I at A 3) That phrasing of the question is the one adopted by petitioners. (Petition at 2)

The court, however, further refined the question presented to "whether [Eason and Satrom], as individual shareholders of Bank Service and guarantors of its indebtedness to GMAC, may assert to Rule 10b-5 claim." (App. I at A 4)

While petitioners are technically accurate in stating that "[t]he Court of Appeals for the Seventh Circuit did not disagree with the District Court's conclusion that respondents were neither purchasers nor sellers of securities . . . ."(Pettition at 5), any attempt to negatively imply that the Court of Appeals agreed with that conclusion is totally inaccurate. The negative implication is without justification because the Court of Appeals disagreed with the District court's conclusion that the *Birnbaum* purchaser-seller limitation had any independent justification after this Court in *Bankers Life* unanimously repudiated the basic holding in *Birnbaum*. Without considering any questions relating to whether Eason and Satrom were purchasers or sellers of a security, the Court of Appeals made an independent appraisal with regard to whether Eason and Satrom were included within the class of persons protected by Rule 10b-5.

REASONS WHY THE CAUSE SHOULD NOT BE REVIEWED BY THIS COURT

1. The Decision Below is Not in Conflict with the Decisions of Other Courts of Appeals.

Petitioners' first two reasons for granting review are intended to show that the decision in this case conflicts with the decisions of other Courts of Appeals on the same matter. The two arguments will be considered together and must be considered in the framework of the question presented, as phrased by petitioners. That question is

its were neither pur-
"whether, notwithstanding respondenney may nevertheless
chasers nor sellers of any security, th0(b) of the Act and
maintain a private action" under §1(
Rule 10b-5. (Petition at 2)

inion below conflicts

Petitioners first argue that the opn *Birnbaum*. In their
with every other circuit's decision orrs recognize that all
second argument, however, petitioneach to the purchaser-
of the circuits take a flexible approacontend that none of
seller limitation; nevertheless, they iberal as the Seventh
the Courts of Appeals has been as li
Circuit.

arguments contradict

Thus, petitioners' first and second es petitioners to rela-
one another. Existing case law forceof absolutes, and the
tivize rather than argue in terms o of degree. The first
alleged conflict thus changes to oneon. The second agru-
argument suggests a head-on collisiand goes further than
ment, that this case simply passes a first argument and
its predecessors, repudiates the ent—persons who are
answers the question petitioners pres securities have been
neither purchasers nor sellers of some time.
allowed to maintain 10b-5 actions for s ency suggests, when

As petitioners' logical inconsiste disregarded and the
references of fealty to *Birnbaum* are nalyzed, any asserted
facts and results of the cases are als alone. With regard
conflict can be seen as one of wordr limitation, Judge
to the *Birnbaum* purchaser-selle historical growth of
Stevens accurately summarized the 0b-5 protection:
the class of persons who could claim 1ver, the rule has been

> "In the last two decades, howe ional types of miscon-
> interpreted to encompass additi o a variety of persons
> duct and to extend protection t al definition of either
> not included within the tradition uers,[13] trust benefici-
> purchaser or seller. Thus, iss

> aries,[14] merging corporations,[15] minority shareholders in short form mergers,[16] parties to incomplete transactions,[17] offerees,[18] and others[19] have been treated as though they were sellers and thereby accorded the protection of the rule. The course of judicial decision since 1952, when *Birnbaum* was decided, *has actually recognized that the class of protected persons is broader than merely purchasers and sellers.*" (App. I at A 8)[3]

Petitioners state the Second, Third, Fifth, Sixth, Eighth and Ninth circuits—allegedly the only other circuits which have considered the *Birnbaum* rule—oppose the decision in this case. But, as the above quote from Judge Stevens' opinion sets forth by way of examples, 10b-5 protection has been extended to persons who were neither purchasers nor sellers of securities: by the Second Circuit in *Vine v. Beneficial Finance Co.*, 374 F. 2d 627 (2d Cir. 1967), *cert. denied*, 389 U.S. 970 (1967) and in *A. T. Brod & Co. v. Perlow*, 375 F. 2d 393 (2d Cir. 1967); by the Fifth Circuit in *Hooper v. Mountain States Securities Corp.*, 282 F. 2d 195 (5th Cir., 1960), *cert. denied*, 365 U.S. 814 (1961); by the Sixth Circuit in *James v. Gerber Products Co.*, 483 F. 2d 944 (6th Cir. 1973); by the Seventh Circuit in *Dasho v. Susquehanna Corp.*, 380 F. 2d 262, 267 (7th Cir. 1967), (Fairchild, J., concurring), *cert denied, sub. nom. Bard v. Dasho*, 389 U.S. 977 (1967); and by the Ninth Circuit in *Manor Drug Stores v. Blue Chip Stamps*, —— F. 2d ——, No. 71-2223, (9th Cir. October 15, 1973) (hearing *en banc* pending).

Vine is one of several "forced seller" cases, a doctrine that the Second and Fifth Circuits extended further in

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[3] All emphasis is added unless otherwise specified. Footnote 19 of the court refers generally to A.R. Bromberg, Securities Law: Fraud Sec. Rule 10b-5, §8.8(1971). The other footnote references of the court are identified in the next paragraph of this brief.

Crane Co. v. Westinghouse Airbrake Co., 419 F. 2d 787 (2d Cir. 1969), *cert. denied*, 400 U.S. 822 (1970) and *Dudley v. Southeastern Factor & Finance Corp.*, 446 F. 2d 303 (5th Cir. 1971), *cert. denied*, 404 U.S. 858 (1971). In *Dudley*, plaintiff claimed that the corporation for which he was a receiver had not received assets which it should have received as a shareholder upon the liquidation of another corporation. The court held that plaintiff's corporation was a "seller" when its investment changed from an equity in a going enterprise to a claim.

A. T. Brod involved a customer-broker transaction with the customer refusing to pay for stock after the price fell. Other cases involving incompleted transactions, and thus no purchaser or seller of securities, are *Opper v. Hancock Securities Corp.*, 367 F. 2d 157 (2d Cir. 1966), *aff'g.* 250 F. Supp. 668 (S.D.N.Y. 1966); *Goodman v. H. Hentz & Co.*, 265 F. Supp 440 (N.D. Ill. 1967); and *Stockwell v. Reynolds & Co.*, 252 F. Supp. 215 (S.D.N.Y. 1965). These cases are sometimes characterized as enunciating the "aborted purchaser-seller doctrine."

The Ninth Circuit was presented with a non-transaction in *Mount Clemens Industries, Inc. v. Bell*, 464 F. 2d 339 (9th Cir. 1972). This is the only Ninth Circuit case cited by petitioners despite two more recent decisions, and even it does not help petitioners with regard to the question they present.

The plaintiff in *Mount Clemens* alleged that it had failed to purchase all of the issued stock of Missile Dynamics Corporation at a sheriff's sale because of defendant's misrepresentations. Plaintiff obviously was not a purchaser or a seller of a security. If the Ninth Circuit had considered that the question presented by petitioners to this Court was determinative, the court could have stopped there. The

Ninth Circuit recognized, however, that the two decades of case law following *Birnbaum* precluded it from doing so:

> "These allegations clearly reveal that appellants never actually purchased or sold the Missile Stock. Yet that circumstance does not end our inquiry, for under the liberal interpretation that has sometimes attended the application of the *Birnbaum* doctrine, *there have been cases in which standing has been afforded to persons who, even though not actual purchasers or sellers, have been deemed to have the required status.*" (464 F. 2d at 345)

The court proceeded to recognize and discuss the cases enunciating the "aborted purchaser-seller doctrine" but distinguished the facts in *Mount Clemens* based upon the "lack of a prior contractual relationship." (464 F. 2d at 346) Since *Mount Clemens*, the Ninth Circuit has decided *Walling v. Beverly Enterprises*, 476 F. 2d 393. (9th Cir. 1973); and *Manor Drug Stores v. Blue Chip Stamps, supra.*

In *Walling*, plaintiffs alleged that the defendant had entered into a contract to purchase their securities without fully intending to perform under the contract. The court recognized at the outset the dictates of *Bankers Life.* The contractual relationship that was missing in *Mount Clemens* was present in *Walling.* The court reversed the trial court's dismissal of the complaint.

In *Manor Drug*, plaintiffs charged they failed to purchase securities because an offering prospectus was misleading. The offering was made pursuant to an antitrust consent decree. Plaintiffs were not parties to the decree and could not have directly enforced the decree. Despite the absence of a "contractual relationship" the court, switching to more of a causational approach, held that

the plaintiffs were entitled to maintain their 10b-5 action. In referring to causation, the court distinguished *Mount Clemens* on the basis that an informed decision by the offerees in *Manor Drug* "could not have been thwarted by the intervention of an earlier or higher bidder" as in *Mount Clemens.* (slip opinion, n. 15)

Causation as a means of harmonizing the results in various 10b-5 cases was suggested by Judge Wisdom in *Rekant v. Dresser,* 425 F. 2d 872 (5th Cir. 1970):

> "The cases professedly disallowing a federal action under §10(b) and Rule 10b-5 for corporate mismanagement may perhaps be distinguished on the issue of causation. In *Birnbaum,* the corporation was not a direct party to the allegedly fraudulent transaction; the president of Newport Steel, in his official capacity, rejected a merger proposal from Follansbee Steel, and instead personally sold his control block of Newport stock to Follansbee at a substantial profit. Similarly in the private damage cases, such as Mutual Shares Corp. v. Genesco, Inc., 2 Cir. 1967, 384 F. 2d 540, there was no direct dealing between the plaintiff and the perpetrator of the alleged fraudulent stock transaction. The hesitancy of courts to grant a cause of action under Rule 10b-5 when the causal connection between the fraud and the injury is not readily apparent, as when there is no direct dealing between the parties, may explain in part, at least, the diverse results." (425 F. 2d at 881)

When the analysis is titled "causation", the court is speaking after the fact. Other courts have stepped back and emphasized the *probability* of causation. Judge Cardozo spoke of persons within the "risk reasonably to be perceived."[4] Judge Stevens focused on the "class for

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[4] *Palsgraf v. Long Island R. Co.,* 248 N.Y. 339, 162 N.E. 99, 100 (1928)

whose special benefit'' 10b-5 was adopted. (App. I at A 7) Judge Ely talked of persons within the ''target area''.[5] In each case the *relation* of the plaintiff to the defendant, not the *title* of either party, is the important element.

Thus, *Landy v. Federal Deposit Insurance Corp.*, 486 F. 2d 139 (3rd Cir. 1973), *petition for cert. filed*, 42 U.S. L.W. 3336 (U.S. November 23, 1973) (No. 73-819) does not put the Third Circuit in conflict with the Seventh. *Landy* involved a bank officer speculating in the market with bank funds. The 10b-5 ''standing'' portion of the decision concerns shareholders who neither bought, sold nor acted in any way. There were no misrepresentations alleged. Based on the *relationship* between the parties, or more appropriately the lack thereof, the result in *Landy* was correct without any reference to *titles* or to *Birnbaum*. *Landy*, with non-action and non-disclosure, has no factual similarity to cases, such as this case, that allege the plaintiff acted in response to misrepresentations and direct dealings involving non-disclosures. Further, the Third Circuit is also the home of *Kahan v. Rosenstiel*, 424 F. 2d 161 (3rd Cir. 1970), *cert. denied*, 398 U.S. 950 (1970). *Kahan* was one of the first major opinions to suggest the causal analysis later articulated from a different angle in the opinion below:

> ''Neither the language of §10(b) and Rule 10b-5 nor the policy they were designed to effectuate mandate adherence to a strict purchaser-seller requirement so as to preclude suits for relief if a plaintiff can establish a causal connection between the violations alleged and plaintiff's loss.'' (429 F. 2d at 798)

Similar to *Landy*, *Simmons v. Wolfson*, 428 F. 2d 455 (6th Cir. 1970), *cert. denied*, 400 U.S. 999 (1971) and

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[5] *In Re Multidistrict Vehicle Air Pollution, M.D.L. No. 31*, 481 F. 2d 122, 127 (9th Cir. 1973)

Erling v. Powell, 429 F. 2d 795 (8th Cir. 1970) involved non-acting shareholders and non-disclosing corporate insiders. These decisions do not place either the Sixth or the Eighth Circuit in conflict with the Seventh. The relevance of *Simmons* is further decreased by the later Sixth Circuit case, *James v. Gerber Products Co.,* cited in the opinion below, *supra,* n. 3. In *James,* the beneficiary of a trust was allowed to bring a 10b-5 action for a sale by the trustee to Gerber. After allowing an admitted non-seller to bring the action, the court gave *Birnbaum* the following dubious reference:

> "We conclude that the interests intended to be served by Rule 10b-5 and the *Birnbaum* decision are best promoted by providing standing to the appellant. Because of the nature of our holding, we do not find it necessary to reach the question of *Birnbaum's* continued viability in this Circuit." (483 F. 2d at 948)

Apart from the factual inapplicability, any surface adherence to *Birnbaum* in *Erling* is negated by the Eighth Circuit's causal approach. First it quoted approvingly the causal approach of *Kahan* quoted above and then phrased its own standard in comparable terms:

> "Similarly, Erling demonstrates no basis for qualifying for standing as a Rule 10 (b)-5 plaintiff under relaxed standards *which permit plaintiffs* who are not buyers or sellers of securities in a technical sense *to sue upon showing damages flowing from misrepresentation, deception or market manipulations by a buyer or seller of securities.*" (429 F. 2d at 799)

That leaves the Tenth Circuit. Petitioners imply the Tenth Circuit has not considered the question. (Petition at 6, n. 2) They overlook *Vincent v. Moench,* 473 F. 2d 430 (10th Cir. 1973). The Tenth Circuit position is succinctly stated:

> "From our point of view, and with the benefit of this trend, we think Section 10 (b)'s language outlawing deception or manipulation 'in connection with the purchase or sale of any security' must be construed as meaning that in a suit for equitable relief any person showing a 'causal connection' between the fraudulent sale of a security and injury to himself may invoke federal jurisdiction." (473 F. 2d at 434-35)

As in this case, the equitable relief sought in *Vincent* was recission. The policy was subsequently extended to damage actions in *Young v. The Seaboard Corporation*, 360 F. Supp. 490 (D. Utah 1973):

> "There is no reasoned basis for concluding that a plaintiff's stake in the outcome of the suit, i.e., his standing, depends upon whether retrospective injunctive relief rather than damages is necessary to cure his injury. Such a distinction is impractical and would soon be eroded. [citing cases] While suits in equity do not raise the conceptual difficulties of properly limiting damages claims, these difficulties may generally be reduced to those found customarily in tort and rule 10b-5 law by applying the *Vincent* courts causality requirement. They are better resolved through an application of the law of damages, as the *Vincent* court's causality approach suggests, rather than through the erection of standing barriers supposedly anchored in the statute itself but which are frequently elbowed aside. In the opinion of this court, the *Vincent* decision suggests that any person, not just one seeking equitable relief, who shows a causal connection between the fraudulent sale of a security and injury to himself may sue under rule 10b-5." (360 F. Supp. at 494-95)

The Tenth Circuit denied an application for interlocutory appeal July 19, 1973.

Petitioners' alleged conflict is transparent. Some circuits, like the Second, Third, and Fifth, purport to accept the *Birnbaum* purchaser-seller limitation, but then extend 10b-5 protection by treating persons as purchasers or sellers even though they are not, as in the recent decision in *Smallwood v. Pearl Brewing Co.*, 489 F. 2d 579, 489-590, 592 (5th Cir. 1974). Other circuits, like the Eighth, Ninth and Tenth are moving toward a causational approach. The recent decisions of the Sixth and Seventh circuits look more to the purpose of Rule 10b-5 and the class of persons to be protected by the Rule. *To a circuit*, however, the answer to the question presented by petitioners is the same. Persons who are neither purchasers nor sellers of securities are allowed to maintain 10b-5 actions.

The decision in this case is not in conflict with the decisions in other circuits. Whatever differences may exist are in the phrasing, not the result. Contrary to petitioners' second argument, the result in this case does not go as far as other decisions. The "forced seller" cases and the "abortive seller-purchaser doctrine" go further. The "contractual relationship" that was missing in *Mount Clemens* or the "direct dealing" that was missing in *Rekant* is present in this case, and without going as far as they have in other decisions, all of the circuits would have reached the same result in this case as the Seventh Circuit reached.

Eason and Satrom are well within the confines of the class of persons protected by §10(b) and Rule 10b-5 as extended by every other circuit. Petitioners do not present a question which this Court need review. Every circuit that has considered the question has responded in the affirmative.

2. The Decision is Correct for Reasons Other Than Those Challenged by Petitioners.

The Guaranty was issued by shareholder-investors as part of a single transaction involving the purchase of the buiness of Waite Leasing in exchange for the Notes, the Guaranty and 7,000 shares of the common stock of Bank Service.

The Notes are specifically included in the definition of "security" in the Act [15 U.S.C. 78c(a)(10)] and in each of the other five federal securities acts, the Securities Act of 1933 [15 U.S.C. 77b(1)]; the Public Utility Holding Company Act of 1935 (15 U.S.C. 79b(a) (16)]; the Trust Indenture Act of 1939 [15 U.S.C. 77ccc(1)]; the Investment Company Act of 1940 [15 U.S.C. 80a-2(a)(36)]; and the Investment Advisers Act of 1940 [15 U.S.C. 80b-2(a) (18)c].

In all but the Act, the guaranty of such a note is also specifically defined as a security. This exclusion does not mean, however, that guaranties are therefore precluded from being securities under the Act. *Tcherepnin v. Knight*, 389 U.S. 332 (1967); *Sanders v. John Nuveen & Co., Inc.*, 463 F. 2d 1075 (7th Cir. 1972), *cert denied*, 409 U.S. 1009 (1972); *cf. Lawrence v. Securities & Exchange Commission*, 398 F. 2d 276 (1st Cir. 1968). As stated in *Tcherepnin:*

> "The Court of Appeals thought it highly significant that the term 'evidence of indebtedness' appears in the definition of security in the 1933 Act but was omitted from the definition in the 1934 Act. We cannot agree that the omission has any controlling significance in this case." (389 U.S. at 344)

As further stated in *Tcherepnin*, "form should be disregarded for substance and the emphasis should be on eco-

nomic reality." (389 U.S. at 336) The economic reality in this case is that the Guaranty had the characteristics and attributes of other securities. It was a promise to pay money just as the Notes (or, for example, the withdrawable capital shares involved in *Tcherepnin*) evidenced promises to pay money. GMAC was an investor in those Notes; that was its business. GMAC would not have made that investment without the issuance of respondents' Guaranty.

There was but one transaction challenged. In that transaction, Eason and Satrom issued the Guaranty along with the issuance of the Notes and the common stock of Bank Service. These securities, the Guaranty, the Notes and the stock, were the securities that were issued in exchange for the business of Waite Leasing. If the fraud had run the other direction, petitioners would have had a 10b-5 action based on their purchase of securities. It was petitioners' fraud, however, that tainted the acquisition of the business of Waite Leasing. It is difficult to perceive that respondents, who are the real parties in interest and have suffered the greatest damage as a result of that fraud, do not have a 10b-5 action against petitioners.

There is no question that respondents "sold" and GMAC "purchased" the Guaranty. Petitioners have only contended that the Guaranty is not a "security" under the Act. To uphold that contention would be to shrink the protection provided by the Act as compared to all other federal securities acts and would ignore the economic realities of the challenged transaction.

Respondents were purchasers or sellers of securities. They sold their Guaranty, which is a "security", to GMAC. They are being sued on the basis of an alleged contractual obligation to pay certain amounts remaining due under the Notes, which are "securities". As real

parties in interest, they were indirect sellers of the 7,000 shares of Bank Service stock and are entitled to maintain a private 10b-5 action just as the trust beneficiary was held to be entitled to maintain an action in *James v. Gerber Products Co., supra.* As a result of petitioners' fraud, the nature of respondents' investment changed from one in a going enterprise to one in a defunct corporation, and they are every bit as much sellers of their own Bank Service stock as the "forced seller" plaintiff in *Dudley v. Southeastern Factor & Finance Corp., supra.* Just as the opinion below concludes that petitioners would not "dispute a federal court's jurisdiction to entertain an appropriate claim by the corporation, Bank Service," (App. I at A 4) respondents are entitled to maintain a derivative action on behalf of that corporation.

Petitioners' question presented is inapplicable. The opinion below is correct for reasons not challenged by petitioners and should not be reviewed by this Court.

3. The Questions Presented Have Been Settled by This Court.

The conclusion that the Guaranty is a security under the Act flows inevitably from this court's decision in *Tcherepnin.* The fact that respondents issued and sold that security entitles them to maintain their 10b-5 action. The fact that respondents have an alleged contractual liability with regard to the Notes also entitles respondents to maintain the action.

Even if the only question presented was as set forth by petitioners, that question too has been settled by this Court. *Bankers Life* put to rest the basic holding in *Birnbaum* that §10(b) was directed solely at practices "usually associated with the sale or purchase of securities" (193 F. 2d at 464). Judge Stevens correctly concluded that:

> "As Judge Sprecher demonstrated in *Jannes v. Microwave Communications, Inc.*, 461 F. 2d 525, 528-530 (7th Cir. 1972), the basic holding of *Birnbaum* was repudiated by a unanimous Supreme Court in the *Bankers Life* case. We are convinced that the purchaser-seller limitation is nothing more than an appendage to that holding without independent justification." (App. I at A 13)

If §10(b) and Rule 10b-5 were to be substantively limited to preserving the integrity of the securities markets, then the purchaser-seller limitation might have a rational basis. There might be some logical justification for requiring a plaintiff personally to have bought or sold securities in the market before he would be entitled to maintain a 10b-5 action. At best, however, the purchaser-seller limitation cannot be justified other than as an appendage to the substantive limitation judicially imposed on §10(b) by *Birnbaum*. When *Bankers Life* stripped away that substantive limitation this Court, in effect, removed the purchaser-seller limitation. Any conclusion to the contrary would impose artificial "standing" barriers that do not exist in any other area of the law.

Statutes are consistently enforced in favor of the class of persons the statute is designed to protect. The language of §10(b) of the Act specifically establishes that it is designed "for the protection of investors." Thus, petitioners' effort to shift the emphasis away from this Court's choice of words "as an investor" (Petition at 15, 16) cannot be reconciled with the language of the statute. Nor can it be reconciled with the references to "*any* person" in Rule 10b-5. *Cf. Affiliated Ute Citizens v. United States*, 406 U.S. 128, 151 (1972).

This Court has passed upon *Birnbaum*. It should not, so soon, be called upon to again pass upon *Birnbaum*. If

the Courts of Appeals, or any of them, were adhering to a strict purchaser-seller standing requirement, it could perhaps be argued otherwise. This is not the case.

As Judge Stevens correctly concludes, this Court has in fact settled *Birnbaum*.

CONCLUSION

For the reasons stated, this Court should not review this case.

Respectfully submitted,

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